Supreme Court, U.S.
FILED

95-498 SEP 23 1995

OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1995 TERM

WILLIAM PARKER, JR.

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES W. PARKMAN,III
401 NORTH FOSTER STREET
DOTHAN, ALABAMA 36303
(334) 793-9009

STATEMENT OF THE ISSUES

I. WHETHER THE VARIOUS CIRCUIT COURTS OF APPEALS HAVE REACHED DIFFERENT AND ERRONEOUS INTERPRETATIONS OF THE SENTENCTING GUIDELINES AS IT RELATES TO DETERMING "LOSS" PURSUANT TO U.S.S.G. §2F1.1.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....1

STATEMENT REGARDING ORAL ARGUMENT.....4

SUMMARY OF JURISDICTION.....5

STATEMENT OF FACTS MATERIAL TO THE ISSUES.....7

REASONS FOR ALLOWING WRIT OF CERTIORARI.....9

SUMMARY OF ARGUMENT.....10

ARGUMENT.....12

CONCLUSION.....26

APPENDIX.....27

TABLE OF AUTHORITIES

United States v. Baum, 974 F.2d 496,499 (4th Cir.1992).....11,14,16,19,25

United States v. Brach, 942 F.2d 141,143 (2nd Cir.1991).....13

United States v. Demer, 794 F.Supp.539, 541 (M.D.Pa.1992).....14

United States v. Galliano, 977 F.2d 1350, 1353 (9th Cir.1992), Cert. den.113 S.Ct.1399 (1993).....13

United States v. Gallegos, 975 F.2d 710, 712, 713 (10th Cir.1992).....11,17,19,25

United States v. Gennuso, 967 F.2d 1460, 1461-1463 (10th Cir.1992).....16

United States v. Haddock, 12 F.3d 950, 968 (10th Cir.1993).....15

United States v. Haggert, 980 F.2d (1st Cir.1992).....18

United States v. Johnson, 16 F.3rd 166, 171 (7th Cir. 1994).....14

United States v. Johnson, 908 F.2d 396, 398 (8th Cir.1990).....13

Kok v. United STates, 17 F.3d 247, 250 (8th Cir.1994).....18

United States v. Kopp, 951 F.2d 521, 531-32 (3d Cir.1991).....14,15

United STates v. Lavoie, 19 F.3d 1102, 1105 (6th Cir.1994).....15

United States V. Mayo, 14 F.3d 128, 133 (2nd Cir.1990).....13

United States v. Menichino, 989 F.2d 438, 441 (11th Cir.1993).....19

United States v. Rothberg, 954 F.2d 217, 218-19 (4th Cir. 1992).....16,17

United States v. Schneider, 930 F.2d 555, 557-58 (7th Cir.1991).....14,15

United States v. Shaw, 3 F.3d 311 (9th Cir.1993).....15

United States v. Smith, 951 F.2d 1164,1166 (10th Cir.1991).....15,25

United States v. Whitehead, 912 F.2d 448 (10th Cir.1990).....14

United States v. Willis, 997 F.2d 407, 418 (8th Cir. 1993).....15

OTHER AUTHORITY

18 U.S.C. Section 1014.....20

Amendment 393.....10

U.S.S.G. Section 2F1.1.....10,11,12,13,14,18,20

TO THE SUPREME COURT OF THE UNITED STATES

COMES NOW your Petitioner, William Parker, Jr., and petitions this Honorable Court for a Writ of Certiorari to issue in the above styled cause under Rule 14, Federal Appellate Rules of the United States, and shows the following:

SUMMARY PROCEEDINGS BELOW

1. On May 25, 1995, the Court of Appeals for the Eleventh Circuit affirmed the decision of the trial court, with opinion in case number 94-6477, attached as Appendix "A" and denied an Application for Suggestion of En Banc Hearing on July 13, 1995.

2. Your Petitioner maintains that the trial court erred and that the decision of the Court of Appeals for the Eleventh Circuit is in conflict with prior decisions of the Circuit Courts of Appeal in prior decisions of similar cases.

3. Your Petitioner further contends that there exists a conflict in the decisions of cases of similar standing among the various Circuits and that the conflict has been addressed by the United States Sentencing Commission.

STATEMENT REGARDING ORAL ARGUMENT

The appellant requests an oral argument on the issue presented for review in this Petition for Writ of Certiorari.

JAMES W. PARKMAN,III
ATTORNEY FOR APPELLANT
401 NORTH FOSTER STREE
DOTHAN, AL 36303

STATEMENT OF JURISDICTION

On May 25, 1995, the Eleventh Circuit Court of Appeals affirmed the decision of the trial court, and overruled the Application for En Ban Rehearing on July 13, 1995.

This Petition for Writ of Certiorari is pursuant to the Due Process Clause of the Fifth Amendment to the Commission of the United States, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Miitia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation, and the Equal Protection Caluse of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

All persons born or natualized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, libery or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

William Parker, Jr. was named in a ninety one (91) count indictment filed in the Middle District of Alabama on June 30, 1993. The indictment charged the appellant with bank fraud and making false statements pursuant to 18 U.S.C. § 1344 and § 1014. On February 16, 1994 the appellant was found guilty of two counts of making false statements pursuant to 18 U.S.C. § 1014. The appellant remained released on bond prior to sentencing on May 25, 1994. The appellant was sentenced to imprisonment for a term of twenty one months.

At the Sentencing Hearing, the District Court found, based on testimony, that the discovery of the fraud occurred on July 27, 1990. At that time, First National Bank of Hartford had suffered a loss of $38,060.83 and First Alabama Bank

had suffered a loss of $140,000.00. The court gave Appellant a $38,000.00 credit against funds in the bankruptcy estate. The court declined to credit Appellant with the $40,000.00 deposited in the bankruptcy estate because neither bank could lay claim to the money. The court calculated the loss attributable to Appellant at $140,060.83.

The appellant was sentenced on May 25, 1994. The appellant was sentenced to 21 months imprisonment, three years of supervised release, and a $10,000.00 fine, but at the request of the defense counsel was released pending appeal.

REASONS FOR ALLOWING WRIT OF CERTIORARI

The record will show that the Petitioner's Appeal to the Eleventh Circuit Court of Appeals was denied on May 25, 1995, and the Suggestion of En Banc Hearing was overrulled on July 13, 1995.

The issue presented for review by this Honorable Court are of Constitutional proportions and there is conflict within the circuits as to the issue of the Application of Section 2F1.1 of the U.S.S.G.

SUMMARY OF THE ARGUMENT

The Petitioner was sentenced on May 25, 1995 to twenty one months imprisonment, three years supervised release and $10,000.00 fine for two counts of making false statements, 18 U.S.C. Section 1014. Basically, there is one issue presented to the Eleventh Circuit for review concerning Appellant's sentence.

First, and foremost, the "loss" amount to be used in determining the range of punishment under §2F1.1 of the U.S.S.G. has been addressed in the various circuits using different criteria in each of those circuits. These different criteria obviously lead to a clear disparity in sentencing.

The United States Sentencing Commission addressed the conflict among the circuits and issued Amendment 393 to 2F1.1 of the U.S.S.G. in an effort to

resolve any conflict. Such has not resolved the disparity among circuits as seen in the review of the various opinions from the various circuits as presented in our argument.

Second, the Petitioner contends that the amount of "loss" used in determing the categories in U.S.S.G. §2F1.1 for sentencing purposes were an incorrect application of these guidelines to the petitioner's case. Should the United States Supreme Court make uniform the application of these guidelines, then the petitioner would contend that the holdings in the tenth and fourth circuits would reduce the loss by $118,000.00 to a total "loss" figur for guideline enhancement pursuant to §2F1.1 to $22,060.83. United States v. Gallegos, 975 F.2d 710, 713 (10th Cir.1994); United States v. Baum, 974 F.2d 496,499 (4th Cir.1992).

ARGUMENT

The Petitioner would aver that various Circuit Courts of Appeals have reached different interpretations of the sentencing guidelines as it relates to determining "loss" pursuant to U.S.S.G. §2F1.1. Therefore, Petitioner seeks this review of his sentence so as to establish a rule of uniformity in this particular area of sentencing enhancement and that the correct and reasonable interpretation of this section will most certainly entitle Petitioner to an appropriate reduction in sentence.

As mentioned, there appears to be a division among circuits as to the calculation of the dollar amount of "loss" to determine the offense level pursuant to U.S.S.G. §2F1.1.

Certain circuits have taken the view

that the criminal defendant should be liable in determining "loss", for the full amount of the loan, regardless of any amounts repaid, or intended to be repaid by the defendant. United States v. Brach, 942 F.2d 141, 143 (2nd Cir.1991); United States v. Galliano, 977 F.2d 1350, 1353 (9th Cir.1992), cert. den. 113 S.Ct. 1399 (1993); United States v. Johnson, 908 F.2d 396, 398 (8th Cir.1990); United States v. Mayo, 14 F.3d 128, 133 (2nd Cir.1990).

However, these holdings clearly appear to be in contradiction of application note 7(b) of the November, 1991 Amendment to U.S.S.G. §2F1.1.

Amendment 393 to U.S.S.G. 2F1.1 held as a clarifying provision that:

> In fraudulent loan application cases and contract procurement cases where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by

> misrepresenting the value of his assets, the loss is the amount of the loss not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan. U.S.S.G. §2F1.1, comment (Note 7(b).

In interpreting §2F1.1 Amendment 393, other circuits have held that "..."loss" in a fraud case is defined primarily as the amount of money the victim has actually ended up losing at the time of sentencing, not what he could have lost or the amount the defendant intended, whichever is higher." United States v. Demer, 794 F.Supp. 539, 541 (M.D.Pa.1992); United States v. Knopp, 951 F.2d 521, 531 (3rd Cir.1991); United States v. Schneider, 930 F.2d 555, 559 (7th Cir.1991); United States v. Whitehead, 912 F.2d 448 (10th Cir.1990); United States v. Baum, 974 F.2d 496, 459 (4th Cir.1992); United States v. Johnson, 16 F.3rd 166, 171 (7th Cir.1994); United States v.

Willis, 997 F.2d 407, 418 (8th Cir.1993); United States v. Smith, 951 F.2d 1164, 1167 (10th Cir.1991); United States v. Shaw, 3 F.3d 311 (9th Cir.1993); United States v. Lavoie, 19 F.3rd 1102, 1105 (6th Cir.1994); United States v. Haddock, 12 F.3rd 950, 968 (10th Cir.1993).

While these decisions are somewhat uniform in their application, the individual decisions appear to be somewhat dissimilar. For example, the decision in Schneider, a 7th Circuit case, held that there was no actual or intended loss proven such that the appellant's sentences should not have been enhanced pursuant to the guidelines. United States v. Schneider, 930 F.2d 555, 559 (7th Cir. 1991). The third Circuit simply reasoned that "loss" is the actual money lost by the victim at the time of the defendant's sentencing. United States v. Kopp, 951 F.2d 521, 531 (3rd Cir.1991). The Tenth

Circuit determines that "loss" is to be measured by the "out of pocket" method that being "the difference between the value of what the victim has parted with and the value of what is received". United States v. Gennuso, 967 F.2d 1460, 1462 (10th Cir. 1992). The Fourth Circuit in relating "loss" to the "potential consequences of default", clearly allowed the value of collateral and the payments made by the defendants to be deducted from the amount of the loan in determining one's "loss". United States v. Baum, 974 F.2d 496, 499 (4th Cir. 1992). In determining any deduction for the value of collateral from a "loss" determination, the Fourth Circuit held "...that the amount recovered or reasonably anticipated to be recovered from collateral that secures a loan should be considered in calculating the amount of actual loss". United States v. Rothberg, 954 F.2d 217

(4th Cir.1992). Rothberg seemingly allowed the deduction of the value of collateral even though the amount of the collateral would have to be recovered from a separate civil proceeding. United States v. Rothberg, 954 F.2d 217, 219 (4th Cir.1992). The acceptance of a deduction in a loss calculation has also been extended by the Tenth Circuit to a sentencing court considering the likelihood of repayment of a settlement amount between the defendant and the bank. United States v. Gallegos, 975 F.2d 710, 713 (10th Cir.1992).

While other courts have recognized the amount of "loss" to be the actual loss or the intended loss, whichever is greater, they have used a different criteria to determine this amount. For example, the Eighth Circuit held that "...the measure of the loss that Kok intended to inflict is the difference

between the amount of credit the bank extended based on the false representations and the amount of credit the bank would have extended had it known the company's true financial condition". Kok v. United States, 17 F.3d 247, 250 (8th Cir.1994). In another loan application case, the First Circuit determined loss based on the intent of the defendant. United States v. Haggert, 980 F.2d (1st Cir.1992).

In the Eleventh Circuit which was the dispositive case used in Petitioner's case, this Circuit Court held that:

> "Loss", as used in §2F1.1, has been defined consistently as the greater of the value of the property the defendant actually took of the property he intended to take. But, subsequent to Menichino's sentencing, appliaction note 7(b) was added to §2F1.1 commentary. That note clarifies that, in a loan application case involving misrepresentation of assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lender could

recover from the collateral. United States v. Menichino, 989 F.2d 438, 441 (11th Cir.1993).

However, Petitioner submits that this holding by the Eleventh Circuit in Menichino, should be expanded so that all payments made by a defendant to a fraud victim and all monies paid to a victim in settlement of their claims should be considered in determining this sentence concept of "loss": United States v. Gallegos, 975 F.2d 710, 713 (10th Cir.1994); United States v. Baum, 974 F.3d 496, 499 (4th Cir.1992). This does not mean that a sentencing court should only consider actual payments, but "...should consider the likelihood of repayment of the settlement amount and sentence accordingly. United States v. Gallegos, 975 F.2d 710, 713 (10th Cir.1992).

An examination of the evidence in Petitioner's case would reveal that the petitioner was convicted on two counts in

the indictment, 18 U.S.C. §1014, involving false statements/applications to a federally insured bank. Further evidence shows that the presentence report pursuant to U.S.S.G. §2F1.1 (b)(1)(H) determined the "loss" in the case to $178,060.83, thereby increasing the base offense level seven points. The petitioner formally objected to this dollar amount of "loss".

At the sentencing hearing, the trial court granted one of the three objections entered by Petitioner, thereby giving Petitioner credit for $38,000.00 thus reducing "loss" to $140,060.83.

The first related "loss" issue pertains to Petitioner's averment that he should have been entitled to have the total "loss" figure reduced by another $78,000.00. The basis for this involves the following:

A. That Petitioner paid $78,000.00 to the First Alabama Bank, one of the two

alleged victim banks herein, on March 2, 1991 as settlement of all claims of loss involved in this case.

B. That this $78,000.00 payment was made some two years prior to any criminal charges brought against Petitioner.

C. That this payment was made from this sale of cattle which the First Alabama Bank had a recorded security interest in said cattle;

D. That the First Alabama Bank credited Petitioner's loan account for the $78,000.00.

E. That all of these transactions from collateral or the cattle to the $78,000.00 payment, were directly related to Petitioner's conviction on count ninety one of this indictment.

F. And, that the District Court did not find for Petitioner on this point and did not allow any further "loss" reduction.

The second "loss" issue relates to Petitioner's argument that he should have been entitled to have the total "loss" figure reduced by an additional $40,000.00. As evidence, the record would indicate the following:

A. That Petitioner paid $40,000.00 to the bankruptcy trustee to be held by the trustee;

B. That the $40,000.00 came from the sale of cattle owned by Petitioner;

C. That the $40,000.00 given to the bankruptcy trustee by Petitioner from the sale of cattle was to only be paid to the two secured creditors, the First Alabama Bank and the First National Bank of Hartford;

D. That this $40,000.00 was paid by Petitioner to his bankruptcy lawyer prior to any bankruptcy being filed, with the lawyer establisheing a trustee and then paying the money to the trustee for the

benefit of the banks;

E. That this money from the sale of the cattle was directly related to the Petitioner's conviction on counts ninety and ninety one of the indictments;

F. That the District Court did not find for the Petitioner on this point and again, did not allow any further "loss" reduction.

Therefore, the payments of $78,000.00 to the First Alabama Bank and/or $40,000.00 to the bankruptcy trustee for either of the victims in this case, First Alabama Bank or First National Bank of Hartford, should be considered in sentencing, since;

A. All monies were obtained from the sale of cattle which was the collateral pledged to the banks in this case;

B. All monies were voluntarily paid by Petitioner prior to any criminal action

sentencing and/or bankruptcy proceeding;

C. That the amount of $78,000.00 was actually given to First Alabama Bank and this bank credited Petitioner's account for this amount;

D. That the sum of $40,000.00 was paid by Petitioner to the Bankruptcy Trust to be paid to either victim bank, obviously showing a clear likelihood of repayment to these banks;

E. That each sum of money would, in fact, reduce the actual loss (net loss) to the banks;

F. These monies were paid voluntarily by Petitioner to actually cut losses.

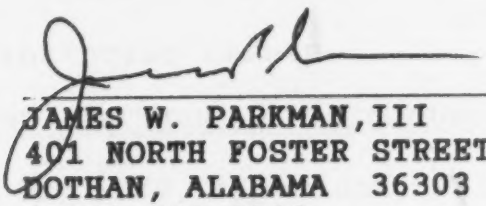
While the petitioner requests that any determination of "loss" should be more akin to the holdings of the Tenth and Fourth Circuits, the petitioner also contends that there is a stronger need for unformity among circuits in sentencing

guideline areas, sucha s the one presented. United States v. Gallegos, 975 F.2d 710, 713 (10th Cir.1994); United States V. Baum, 974 F.2d 496, 499 (4th Cir.1992); United States v. Smith, 951 F.2d 1164, 1167 (10th Cir.1991). To allow otherwise is simply to continue to allow disparity in sentences in the different circuits. This is not what the sentencing guidelines intended when created. United States Sentencing Commission, Guidelines Manual, Ch.1 Part A (Nov.1991).

CONCLUSION

WHEREFORE, the petitioner contends that this Honorable Court should grant his Petition for Writ of Certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit and remand the case to the trial court for a sentencing hearing consistent with the United States Sentencing Commission Guidelines, as applicable.

Respectfully submitted,



JAMES W. PARKMAN,III
401 NORTH FOSTER STREET
DOTHAN, ALABAMA 36303
(334) 793-9009

APPENDIX A

FROM THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO: 94-6477

D.C.DOCKET NO: CR 93-192-S

UNITED STATES OF AMERICA,

V.

WILLIAM M. PARKER, JR.

Before HATCHETT, EDMONDSON, and COX, Circuit Judges.

PER CURIAM:

In this criminal appeal, we affirm the district court's rulings on trial matters and sentencing issues.

FACTUAL AND PROCEDURAL BACKGROUND

In November, 1989, appellant, William Parker, approached Don Hughes, an officer of First National Bank of Hartford (FNBH) and discussed obtaining a loan in the amount of $100,000.00. Upon loan approval, Parker signed a promissory note and pledged 2 cattle trailers and 260 head of cattle as security for the loan. Parker told Hughes that he owned 260 head

of cattle located on Ted Adam's farm in Florida. Parker, however, had told Adams that these cattle belonged to Dan Adcock. Hughes relied upon these representations in making the loan to Parker. On May 15, 1990, Parker paid the interest on the loan, and FNBH renewed the note. On July 30, 1990, before the note became due, Parker declared bankruptcy. Thereafter, FNBH could not locate the 260 head of cattle that Parker pledged as security for the loan, but did not sell the 2 cattle trailers and some other cattle of Parker's. These transactions left FNBH with a deficiency of $38,060.83.

First Alabama Bank (First Alabama) in Dothan, Alabama, loaned Parker $280,000 in December 1989, taking a security interest in 1,000 head of cattle that Parker represented he owned. Parker took officers of First Alabama to several locations to inspect the cattle. In

making the loan, Mason Morrow, an officer of First Alabama, relied on Parker's representation of ownership of the cattle. In May 1990, Parker paid half of the loan, and First Alabama renewed the note for $140,000, retaining a security interest in 500 head of cattle.

After Parker filed for bankruptcy, First Alabama did not receive the 500 cattle used to secure the loan.

At the time he filed for bankruptcy, Parker endorsed a $40,000 check from a livestock company for the sale of cattle and submitted the check to the bankruptcy trustee. In March 1991, Parker settled the debt with First Alabama for $78,000.00. Parker signed a promissory note to Adcock, and Adcock gave Parker's lawyer a $78,000.00 check, which was used to settle the debt.

On June 30, 1990, a grand jury in the Middle District of Alabama indicted

Parker. The indictment charged Parker and codefendants with eighty-nine counts of fraud against a financial institution in the nature of a check kiting scheme in violation of 18 U.S.C. §1344. The indictment also charged Parker alone with two counts of making false statements to financial institutions in obtaining loans in violation of 18 U.S.C. §1014. On February 16, 1994 a jury found Parker guilty of the two violations of 18 U.S.C. §1014.

At sentencing, the district court found, based on Morrow's testimony, that the discovery of the fraud occurred on July 27, 1990. At that time, FNBH had suffered a $38,060.83 loss, and First Alabama had suffered a $140,000 loss. The district court held that the $78,000 constituted a loan from Adcock, and not proceeds from the sale of cattle. The court gave Parker a $38,000 credit against

funds in the bankruptcy estate. The court declined, however, to credit Parker with the $40,000 deposited in the bankruptcy estate because neither bank could lay claim to the money. The court calculated the loss attributable to Parker's offense at $140,060.83. On May 25, 1994, the district court sentenced Parker to twenty-one months of imprisonment, three years of supervised release, and a $10,000 fine.

CONTENTIONS

Parker contends that insufficient evidence exists to support the jury's finding of guilt beyond a reasonable doubt on the two counts of bank fraud. He also contends that the sentencing court erred in calculating the dollar loss attributable to this offense, and thus he is entitled to a reduction in sentence.

The government responds that the record contains sufficient evidence to sustain Parker's conviction for making

false statements to banks in applying for loans. The government also argues that the sentencing court's findings of fact regarding the dollar loss attributable to Parker did not constitute clear error, and therefore this court should affirm Parker's sentence.

ISSUES

The issues for review are: (1) whether the evidence presented at trial sufficiently supported Parker's conviction for making false statements to financial institutions in obtaining loans; and (2) whether the district court correctly determined the dollar loss in arriving at Parker's offense level under U.S.S.G. §2F1.1.

DISCUSSION

A. Sufficiency of the evidence

This court reviews the sufficiency of evidence supporting a verdict of guilt as a question of law using the de novo

standard of review. United States v. Jones, 28 F.3d 1574, 1577 (11th Cir. 1994). When presented with a sufficiency of the evidence challenge, "we review the evidence in a light most favorable to the government to determine whether a reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt." United States v. Freyre-Lazaro, 3 F.3d 1496, 1502 (11th Cir.1993), cert. denied, 114 S.Ct. 1385 (1994). "In applying this standard all reasonable inferences and credibility choices must be made in favor of the jury verdict and that verdict must be sustained if there is substantial evidence to support it..." United States v. Pintado, 715 F.2d 1501, 1503 (11th Cir.1983) (quoting United States v. Davis, 666 F.2d 195, 201 (5th Cir. Unit B 1982).[1]

---

[1] In Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982), this court adopted as precedent all post-

Title 18 U.S.C. §1014 states in pertinent part:

> Whoever makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of...any institution the accounts of which are insured by the Federal Deposit Insurance Corporation ...upon any application...or loan...shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The record contains sufficient evidence that a reasonable jury could have found the elements of the offense beyond a reasonable doubt. Hughes testified that Parker told him that he owned the cattle put up as collateral on the FNBH loan, and Morrow testified that Parker stated that he owned the cattle used as collateral for the First Alabama loan. Adams testified that Parker told him that Adcock owned the cattle kept at Adam's farm. A former

---

September 30, 1981 decision of Unit B of the former Fifth Circuit.

employee of Parker's who kept inventory records testified that Parker did not own any cattle out on pasture at the time Parker made his representation of ownership to First Alabama. Adcock testified that he paid for the cattle that Parker used as collateral for the First Alabama loan. He also testified that Parker had a one-half interest in any profit rendered from the cattle, but that Parker owed him money and thus was unlikely to receive any profits. Parker did not tell Adcock that he pledged the cattle as security for a loan. Therefore, sufficient evidence exists that Parker knowingly made false statements to the banks concerning a material fact upon his application for a loan.

Moreover, Parker's representations were certainly "capable of influencing" the banks, and both Hughes and Morrow testified that they relied on Parker's

representations of cattle ownership in making the loans. United States v. Scott, 701 F.2d 1340, 1345 (11th Cir.), cert. denied, 464 U.S. 856 (1983). Finally, the parties stipulated to the fact that the Federal Deposit Insurance Corporation insures both FNBH and First Alabama.

Therefore, we find that the record contains sufficient evidence to sustain Parker's conviction under 18 U.S.C. §1014.

B. Calculation of Loss at Sentencing

For offenses involving fraud or deceit, if the loss exceeds $120,000, the sentencing court must increase the offense level seven levels. U.S.S.G. §2F1.1(b)(1)(H).

> In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim...For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has

> recovered (or can expect to recover) from any assets pledged to secure the loan.

U.S.S.G. §2F1.1, comment. (n.7(b)). See also United States v. Menichino, 989 F.2d 438, 441 (11th Cir.1993). "The calculation of the amount of loss under U.S.S.G. §2F1.1 is a factual determination reviewed for clear error." Menichino, 989 F.2d at 440.

Parker contends that he should receive credit for the $78,000 paid to First Alabama and the $40,000 deposited into the bankruptcy estate because these monies were obtained from the sale of cattle and were paid voluntarily in order to reduce the amount of loss to the banks. We reject Parker's contentions.

On July 27, 1990, the date of the discovery of the fraud, the amount of the loss constituted approximately $178,000. At that time, Parker owed $140,000 to First Alabama, and the bank had been

informed that the cattle used as security for the loan did not belong to Parker and had been moved to another state. Therefore, as of the date of the offense, First Alabama had not recovered any amount of the loan, and could not expect to recover any assets pledged to secure the loan. In addition, the sentencing court found that neither bank could lay claim to the $40,000 submitted to the bankruptcy estate. Parker has failed to show that this finding was clearly erroneous.

In short, Parker has failed to show that the district court's loss calculation constituted error, and thus we affirm his sentence.

CONCLUSION

For the reasons stated, we find that sufficient evidence exists to support Parker's conviction, and that the district court did not err in calculating his sentence. **AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO: 94-6477

UNITED STATES OF AMERICA

V.

WILLIAM PARKER, JR.

Before Judge Hatchett, Edmondson and Cox, Circuit Judges

In this appeal from a final judgment of conviction in a criminal case in the United States District Court for the Middle District of Alabama, the Petitioner, William Parker, Jr., raises and presents to this Court the following issues:

I. **WHETHER THE VARIOUS CIRCUIT COURTS OF APPEALS HAVE REACHED DIFFERENT AND ERRONEOUS INTERPRETATIONS OF THE SENTENCTING GUIDELINES AS IT RELATES TO DETERMING "LOSS" PURSUANT TO U.S.S.G. §2F1.1.**

Affirmed. May 25, 1995.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO: — 94-6477

UNITED STATES OF AMERICA

V.

WILLLIAM PARKER, JR.

Before HATCHETT, EDMONDSON, AND COX, Circuit Judges

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested taht the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

DATED July 13, 1995

—